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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re DYLAN W., a Person Coming Under
the Juvenile Court Law.

B218749
(Los Angeles County Super. Ct.
No. CK76032)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARCIA W.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret Henry, Judge. Affirmed and remanded.

Janice A. Jenkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

Marcia W. (mother) appeals from the order of August 20, 2009, establishing a legal guardianship for her son, Dylan W., under Welfare and Institutions Code section 366.26.¹ She contends the guardianship order should be reversed because the Department of Children and Family Services (Department) failed to comply with the inquiry and notice provisions of the Indian Child Welfare Act of 1978 (the ICWA) (92 Stat. 3069, 25 U.S.C. §§ 1901-1963) and California's implementing provisions. We affirm the guardianship order but remand for compliance with the ICWA.

STATEMENT OF FACTS AND PROCEDURE

Dylan was born to mother and Wayne W. (father)² in 1997. Dylan lived with mother, Robert W., and two children born to mother and Robert. In 2007, Dylan was diagnosed with mood disorder not otherwise specified, attention-deficit/hyperactivity disorder, Asperger's disorder, cognitive disorder not otherwise specified, developmental coordination disorder, disorder of written expression, and learning disorder not otherwise specified. Intelligence testing revealed borderline intellectual functioning.

Mother refused to understand Dylan's limitations. Robert "hated" Dylan, physically and emotionally abused him, wanted him out of the family home, and demanded mother choose between Robert and Dylan.

In December 2008, Robert gave mother an ultimatum that, if Dylan was not out of the home by January 1, 2009, Robert would separate from mother. Because she wanted Dylan placed out of the home in a residential placement, mother refused to accept services to assist in preventing a break-up of the family. Dylan was not eligible for residential placement.

¹ Hereinafter, all statutory references will be to the Welfare and Institutions Code, unless otherwise indicated.

² Father, who lived in Florida, did not appear in person for the proceedings. However, he made himself available for a telephone interview with the social worker, and an attorney was appointed to represent him.

On January 1, 2009, Dylan moved into the home of Kathleen D., a friend of mother who had been Dylan's babysitter for years. Kathleen gave Dylan the structure and one-on-one attention that he needed. Dylan was happy and thrived in Kathleen's home. He wanted to remain there. His difficult behaviors improved. He ate the food he was given and there were no outbursts or aggressions. He stopped getting into trouble in school, because he was no longer under stress at home.

The Department detained Dylan with Kathleen D. on January 20, 2009, and filed a section 300 petition, because of mother's unwillingness to care for Dylan. The Department referred Dylan to the Regional Center for evaluation.³

In March 2009, Dylan was diagnosed with borderline intellectual functioning, oppositional defiant disorder, and pervasive developmental disorder.

On May 7, 2009, Dylan was declared a dependent of the court, based on sustained allegations under section 300, subdivision (b) (substantial risk of serious physical harm due to failure to adequately supervise) that: mother was unable to provide care for the child due to the child's special needs; and mother's live-in male companion physically abused the child and mother failed to protect him from such physical abuse. Custody was taken from the parents and given to the Department for suitable placement with a nonrelated extended family member. Mother waived reunification services orally and in writing, permanent placement services were ordered, and a section 366.26 hearing was scheduled to pursue legal guardianship.

Dylan was accepted as a client of the Regional Center.

On August 20, 2009, the date set for a contested section 366.26 hearing, mother filed a petition under section 388 to vacate the order of May 7, 2009, setting a section 366.26 hearing. She wanted the dependency court to order the Department to address the possibility of a residential placement for Dylan. On August 20, 2009, the dependency court denied the petition, because it did not state new evidence or a change

³ Regional centers assist persons with developmental disabilities and their families "in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community." (§ 4640.7, subd. (a).)

of circumstances and the proposed change of order did not promote the child's best interest.

At the section 366.26 hearing, on August 20, 2009, the dependency court ordered legal guardianship and appointed Kathleen as Dylan's guardian. Kathleen provided Dylan with a warm, nurturing home where Dylan thrived. Mother still played a large part in Dylan's life, in that she visited him regularly and took him to appointments, and Dylan loved her. However, Dylan loved living in Kathleen's home, where he "[did not] feel hated" and he wanted to live there "forever."

DISCUSSION

Procedural Facts Concerning ICWA Notice

Mother stated maternal grandmother was one-quarter American Indian.⁴ However, mother and maternal grandmother stated they did not know which tribe the heritage was in. At the detention hearing on January 23, 2009, the dependency court ordered mother to provide any identifying information about relatives and ordered the social worker to interview maternal grandmother, who was present at the hearing.

The social worker mailed Notice of Child Custody Proceeding for Indian Child (ICWA-030) to the Bureau of Indian Affairs (BIA), the Secretary of the Interior, and the parents. Maternal grandmother's full name was provided, but her current and former addresses, and birth date and place, were listed as "unknown." No information was listed concerning the maternal grandfather or maternal great-grandparents. The notice stated father "has denied Native American ancestry." On February 26, 2009, BIA returned the ICWA notice for insufficient information.

⁴ Mother told the dependency court on January 23, 2009, that maternal grandmother was "half Indian," but she subsequently wrote on the Indian Child Inquiry form and stated to the social worker that maternal grandmother was one-quarter American Indian.

On May 21, 2009, the dependency court found this is not an ICWA case, as no responses to the ICWA notices were received.

Contentions

Mother contends the guardianship order must be reversed because the Department failed to inquire and include information about the maternal grandmother, father, and Dylan's half-siblings in the ICWA notices. The Department concedes that inquiry and notice concerning maternal grandmother and father, required by California statute and rule to implement the ICWA,⁵ were not complied with.

As the record states that father "has denied Native American ancestry," we conclude the duty to inquire about Indian heritage on the paternal side was complied with. However, the ICWA notice failed to include available information from maternal grandmother.

Remedy

Mother contends we should reverse the guardianship order and remand the matter to the dependency court with directions to insure compliance with the ICWA notice provisions. The Department acknowledges a limited remand is required but contends reversal is not necessary. The ICWA notice errors are not jurisdictional. (See, e.g., *In re Brooke C.* (2005) 127 Cal.App.4th 377, 384-385.) They are subject to harmless error

⁵ When the dependency court knows or has reason to know that an Indian child is involved, notice of the dependency proceeding must be given to the parents and tribe; except, if the tribe's identity cannot be determined, notice shall be given to the Secretary of the Interior. (25 U.S.C. § 1912, subd. (a).) The dependency court and the Department must "inquire whether [the] child . . . is or may be an Indian child[.]" (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(a).) A social worker having reason to know the child is or may be an Indian child must interview, among others, the child's grandparents, and must contact BIA for assistance in identifying the tribe in which the child may be a member. (Cal. Rules of Court, rule 5.481(a)(4).)

analysis. (*Id.* at p. 385; *In re G.L.* (2009) 177 Cal.App.4th 683, 695-696; Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) To accomplish the limited remand for purposes of exacting compliance with the ICWA, reversal of the guardianship order is not required. (See *In re Veronica G.* (2007) 157 Cal.App.4th 179, 186-188; *In re Brooke C.*, *supra*, at pp. 383-385; but see *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 785.) “If, after proper notice is given under the ICWA, [the child] is determined not to be an Indian child and the ICWA does not apply, prior defective notice becomes harmless error. [Citation.] In this event, no basis exists to attack a prior order because of failure to comply with the ICWA.” (*In re Brooke C.*, *supra*, at p. 385.)

DISPOSITION

The guardianship order is affirmed. The matter is remanded to the dependency court for compliance with the inquiry and notice provisions of the ICWA.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.